In the Supreme Court of the United States

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OCTOBER TERM, 1977

No. 77-285

STATE OF CALIFORNIA, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
Ninth Circuit Court of Appeals

Motion of Environmental Defense Fund, Natural Resources Defense Council, Inc., and Sierra Club to File Brief Amici Curiae and Amici Curiae Brief

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and

Amici Curiae Brief

Pursuant to Rule 42(3) of the Rules of this Court, the Environmental Defense Fund, Natural Resources Defense Council, Inc., and Sierra Club respectfully move the Court for leave to file the attached brief *amici curiae* in support of the petitioners in the above entitled case. Both counsel for the petitioners and counsel for the respondent

have consented to the filing of the attached brief. A motion for leave to file is necessary, however, since the petitioners' brief was due no later than January 19, 1978: the attached brief is thus presented outside of the time allowed for the filing of the party supported. Rule 42(2). A typewritten copy of the attached brief was supplied to counsel for each of the parties prior to the filing of this motion.

STATEMENT OF INTERESTS OF AMICI CURIAE

The Environmental Defense Fund, Inc. (EDF) is a non-profit, public-benefit membership corporation organized under the laws of the State of New York. It has offices and resides in New York, the District of Columbia, and in Denver, Colorado and Berkeley, California. EDF's nationwide membership of over 45,000 scientists and other citizens of the United States includes over 8,000 citizens and residents of the 17 western states where Bureau of Reclamation projects are operated. EDF and its members seek to preserve and protect the natural resources and environment of the United States.

The Natural Resources Defense Council, Inc. (NRDC) is a national non-profit membership corporation organized under the laws of the State of New York, and composed of lawyers, scientists, and concerned private citizens who use and enjoy our natural resources and who seek to protect these resources from encroachment and destruction. NRDC has offices in New York, the District of Columbia, and Palo Alto, California, and has approximately 30,000 members nationally. Nearly 9,000 of these members are in the 17 western states where Bureau of Reclamation projects are operated, and more than 3,000 reside in California where this litigation arose.

The Sierra Club is a national non-profit corporation organized and existing under the laws of the State of California with its principal place of business in the City and County of San Francisco, State of California. Sierra Club is a national conservation organization having approximately 155,000 members of whom approximately 80,000 reside in California. The Sierra Club and its members seek to enhance and protect the natural resources and human environment of this country.

EDF, NRDC and Sierra Club exist to promote research and action and to take action on their own behalf, and on behalf of their members, to protect and enhance the natural and social environment, including, but not limited to, the preservation of rivers, wildlife, and recreational opportunities. EDF, NRDC and Sierra Club participate in this case *amici curiae* on their own behalf as well as on behalf of their members, many of whom are directly affected by planned Bureau of Reclamation projects existing, under construction, or in the planning stages in the 17 western states.

This case raises issues of extreme importance concerning the operation of Bureau of Reclamation projects. Whether the Bureau is required to comply with California law in the acquisition of unappropriated water to be used in its operation of the Central Valley Project (CVP) is an important determinant of the environmental impact of the Bureau's activities, and the *amici* organizations and their members are vitally interested in, and directly affected by, the construction and operation of Bureau of Reclamation projects which may be affected by this Court's decision here.

The *amici* have been extensively involved in administrative proceedings and litigation concerning the operation of Bureau of Reclamation projects, raising issues related to

those in the instant case. For example, *amicus* Environmental Defense Fund was a party to the administrative proceedings before the State Water Resources Control Board which culminated in Decision 1422, the administrative decision which gave rise to this litigation. *Amici* NRDC and EDF are also engaged in litigation concerning the construction and operation of another unit of the Central Valley Project, the Auburn-Folsom South Unit. One issue raised in that litigation is whether the Bureau of Reclamation must comply with Decision 1400 of the State Water Resources Control Board which granted and placed terms and conditions on the Bureau's applications to appropriate water for that project. *NRDC, et al. v. Stamm,* No. S-2663 (E.D. Calif. filed December 1972). Proceedings in that case have been stayed pending resolution of the issues in this case. The resolution of the issues presented here is thus of vital concern to these *amici.*

CONCLUSION

For each of the foregoing reasons, the motion to file the attached brief *amici curiae* should be granted.

Respectfully submitted,

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ARGUMENT

I.

SUMMARY OF ARGUMENT

The issues presented by this appeal have been extensively briefed by the State of California, as petitioner. We do not intend to reargue the same considerations. In large part, we concur in the arguments made and the conclusions suggested. There are several points, however, which we feel

merit particular consideration by this Court, yet whose importance may have been obscured by the lengthy briefs submitted to date. It is to those limited issues that this brief will be addressed.

Initially, we believe that this case should be decided on far simpler grounds than those considered by the courts below. It is an axiomatic principle of statutory construction that where a statute is unambiguous on its face, the Court should not look behind the plain language of the statute. In the present case, the language of the statutory provision in issue, Section 8 of the Reclamation Act of 1902, is undeniably clear. Neither the opinion of the District Court or of the Court of Appeals, nor the arguments advanced by the United States below identify any ambiguity in the statute which would require the far-reaching inquiries made by the District Court into the historical background and legislative history of the Act.

A second and related principle of statutory construction which is plainly violated by the District Court's analysis is that it is the duty of Congress and not the courts to amend existing federal legislation. The courts below, in the guise of "statutory interpretation", have actually engaged in a substantial revision of long-standing federal-state water relations. Without questioning the motivations of the courts or the soundness of the decisions, as a matter of water policy it is clear that this approach is unjustified. The wide-ranging policy considerations which underlie the respective positions of the State of California and the federal government concerning water resource utilization are properly left to Congress rather than the courts.

Finally, even if one were justified in looking behind the plain meaning of the statute, the District Court failed to consider the legislative history and historical background

in the proper context. The decisions of the courts below totally ignore the overall framework within which the federal reclamation project in question must operate. Given the complexities of water resource management, and its obvious importance to states and local entities, it is impossible to assume that Congress intended to allow these reclamation projects to operate in a vacuum, irrespective of inextricably interwoven state water policies. Yet that is precisely the result which the analysis of the District Court would achieve.

The District Court points to no comprehensive federal program of water resource utilization designed to supplant the established state machinery. Indeed, it could not point to such a program, for none exists. The lack of a comprehensive federal program of water resource utilization, and the presence of such a system in the states, supports the conclusion that federal reclamation projects were intended to be operated by the federal government in conformity with the framework established by state law. To hold otherwise would be to suggest that Congress, while recognizing the crucial nature of water management, intended that chaos rather than order should prevail in the management of that resource. Such a conclusion cannot be supported.

II.

A. THE DISTRICT COURT ERRED IN ITS ATTEMPT TO LOOK BEHIND THE PLAIN MEANING OF SECTION 8 OF THE RECLAMATION ACT OF 1902.

1. A COURT MAY NOT INQUIRE BEHIND THE MEANING OF A CLEAR AND UNAMBIGUOUS STATUTE.

The primary issue presented in this action was framed by the District Court as follows:

> "Whether a state may impose terms and conditions on the federal government's acquisition of water for reclamation projects." 403 F.Supp. 874, 877.

In resolving this question, both the courts below, as well as the parties, agree that the cornerstone of the inquiry is Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383 (1970). Section 8 provides:

> "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any state or federal government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."

It is an axiomatic principle of statutory interpretation that where the meaning of a statute is plain and unambiguous, examination of the legislative history is unnecessary and inappropriate. This Court has often held that where the language of a statute is clear, courts should look no further. *Ex parte Collett* (1948) 337 U.S. 55; *Caminetti v. United States* (1916) 242 U.S. 470, 485, 490; *Helvering v. City Bank Farmers Trust Co.* (1935) 296 U.S. 85, 89; *Thompson v. United States* (1917) 246 U.S. 547, 551. In *Caminetti,* the Court adverted to the "recognized rule" that:

> "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning . . . [W]hen words are free from doubt they must be taken as the final expression of the legislative intent and are not to be added to or subtracted from by considerations drawn from . . . reports accompanying their introduction, or from any extraneous source." 242 U.S. at 490.

A corollary to this rule is the principle that legislative history cannot be used to change the meaning of a clear and unambiguous statute. *United States v. Oregon* (1961) 366 U.S. 643. As the Court has stated:

> "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco, Inc. v. Walling* (1945) 324 U.S. 244 at 260.

These basic rules of statutory interpretation come squarely into play in analyzing the District Court's treatment of Section 8 of the 1902 Act. *Amici* do not urge the Court to endorse application of rigid rules or strictly linguistic principles of decision making. There are concededly many instances where ambiguous statutory language is susceptible of more than one meaning. See, *e.g., Train v. Colorado Public Interest Research Group* (1976) 426 U.S. 1. In such instances, the legislative history is obviously one source which must be looked to in interpreting the statute. Such is simply not the case here.

2. SECTION 8 IS A PLAIN STATEMENT, AND THE DISTRICT COURT IDENTIFIED NO AMBIGUITIES.

Rarely has a statutory scheme been more clearly and unambiguously expressed than in the language of Section 8. In establishing the framework for federal reclamation projects, Congress explicitly provided that:

1. The Act did not intend to interfere with the laws of the states relating to control, appropriation, use or distribution of water used in irrigation;

2. The Secretary of the Interior was specifically instructed to proceed in conformity with such state laws;

3. The Act was not to affect the existing rights of any governmental entity or private citizen.[1]

Applying these requirements to the present controversy, there is no dispute that under California law, one who seeks to appropriate water must apply for and receive a permit from the California State Water Resources Control Board. California Water Code §§ 1201, 1225, 1250-1258, 1375-1415. In accordance with this requirement of state law, and in accordance with its own long-standing practice, the Bureau of Reclamation duly applied to the Board for permits authorizing the appropriation of water in connection with the New Melones Project. 403 F.Supp. 880.[2] In considering such applications, California law requires "the Board to evaluate the specific intended use of each proposed project and find that it is reasonable, beneficial, and in the public interest. The Board undertakes a balancing of competing demands and policy considerations and has broad discretion. Cal. Water Code § 1240." 403 F.Supp. 880-81. After evaluating the application in light of these criteria, the Board, in Decision 1422, granted the requested permits subject to certain terms and conditions.[3]

This would appear to be the proper disposition of the matter given the state requirements of Section 8 that the Secretary "proceed in conformity with" state law concerning the "appropriation" of water. The Bureau did not chal-

1. Because of the clarity of Section 8, insofar as it compels Bureau compliance with state law, we believe the section satisfies the test of *Environmental Protection Agency v. California* (1976) 426 U.S. 200 and *Hancock v. Train* (1976) 426 U.S. 167.

2. This application was consistent with the Bureau's traditional approach in such matters. The Bureau has always applied to the State Board for permits to appropriate water for the CVP. Likewise, as it did here, the State Board has often subjected its approvals to conditions. See, Brief for Petitioners, at pp. 36-40.

3. The provisions of Decision 1422 are set forth in the opinion of the District Court, at 403 F.Supp. 880-882.

lenge the Board's action as an improper application of state law, under the procedures established by California law for such a challenge. As a result, the *amici* believe that the principle of *res judicata* precludes the United States from challenging the validity of the conditions in a collateral proceeding. *United States v. Utah Construction and Mining Co.* (1966) 384 U.S. 394; *French v. Rishell* (1953) 40 Cal.2d 477.

The United States filed such a collateral action, however, and argued that the laws of the State of California did not, in fact, have to be honored by the Bureau in its attempts to appropriate water for the New Melones Project. The District Court agreed, and through a tortured analysis concluded that Section 8 required compliance only with the "form" but not the "substance" of state laws. 403 F.Supp. 889-890.[4]

4. The District Court's explanation of this interpretation is curious at best. The Court adopted the argument of the United States that applications are to be submitted for appropriations as a matter of comity. Briefly stated, the Court concluded the United States must comply with the forms of state law (e.g., submitting applications) but not with the substance (proper State Board conditions, for example, on those applications). Certainly, nothing in the statute supports such a construction. Indeed, *amici* are hard-pressed to understand how such an act could ever be mandated by statute, since comity is by definition an act *not* required by a particular law. ("Comity is not a rule of law, but one of practice, convenience and expediency . . . Comity persuades but it does not command." *Mast, Foos & Co. v. Stover Manufacturing Co.* (1900) 177 U.S. 485, 488.) More importantly, it is difficult to understand how submitting to the *form* of state law but not the *substance* is a matter of comity. Were the Bureau truly acting on the grounds of comity, the Bureau would conform its actions to the framework of state law, and the principles of comity appear entirely inapplicable to this situation. Significantly, *no* cases have been relied upon by the District Court in support of this novel proposition. The *amici* thus agree that the Court of Appeals properly rejected the comity analysis advanced by the District Court. On the other hand, we also see no textual support in Section 8 for the Court of Appeals' conclusion that Section 8, rather than comity, compels Bureau compliance with the "forms" but not the "substance" of state law.

In reaching this conclusion, the District Court's opinion is glaringly devoid of any discussion of the express terms of Section 8. The court points to nothing in the statute which lends credence to its interpretation. Rather, it purports to place great reliance on the legislative history of the Act. Perhaps the most striking aspect of the District Court's opinion is the total failure to discuss or identify the "ambiguity" or "uncertainty" in Section 8 which forced it to resort to the legislative history in the first place as an aid to its interpretation of that section.[5] Not one sentence of the opinion is devoted to discussing the nature of this presumed ambiguity. *Amici* submit that this failure is explained by the fact that no ambiguity exists.[6] In the absence

5. Significantly, the only mention of any ambiguity or lack of clarity in Section 8 is found in two passing statements which are buried in the middle of the District Court's opinion. By the time it mentioned the existence of a purported ambiguity, the District Court had already virtually completed its discussion of the legislative history. This serves to highlight the Court's total disregard of the statute as written. The two references to a supposed ambiguity are:

> "However, by the inclusion of Section 8, Congress recognized that notwithstanding the national scope of reclamation, state law had important, albeit limited, functions in the equation. Certainly Section 8 on its face does not make crystal clear the role of state law, although it is apparent that state law *does* have a role in regard to federal reclamation projects." (emphasis in original text) 403 F. Supp. at 887.

> ". . . [I]t is certainly not clear from the language of Section 8 nor from the Congressional history that the federal government must apply to states for permits to appropriate or that the federal government must comply with terms and conditions which states might impose on such permits." 403 F. Supp. at 889.

Obviously, the Court was not concerned with explaining what it perceived the ambiguity to be.

6. It is difficult to conceive of more emphatic language which Congress could have used to make its intention clear. Thus, Section 8 provides that "nothing in this Act ***shall be construed as affecting or intending to affect or in any way interfere with***" state law. (emphasis added). As the Court of Appeals for the District of Columbia

of such ambiguity, the District Court's purported reliance on the legislative history is misplaced.

B. THE DISTRICT COURT ENGAGED IN AN IMPROPER EXERCISE OF LEGISLATIVE POWER.

From the foregoing, it is clear that the District Court was not interpreting the terms of an ambiguous statutory provision. Rather, it was violating a second black-letter principle of statutory construction, namely, that it is for Congress, and not the courts, to modify prior legislative enactments.

The very danger which these principles of statutory construction are designed to prevent is plainly illustrated in the present case by the markedly contrasting treatment afforded the legislative history by the lower courts and the United States, on the one hand, and the State of California, on the other. In going back three-quarters of a century, each side has carefully culled those bits and pieces of the legislative record which they believe support their position. While we endorse the State of California's reading of that legislative history, *amici* do not intend to argue herein the soundness of either interpretation of the legislative history.[7] Our quarrel with the courts below comes at a more basic level in that we do not believe the courts

Circuit so aptly stated in a recent decision, "the proper function of legislative history is to resolve ambiguity, not to create it." *FTC v. Manager, Retail Credit Co., Miami Br. Off.*, 515 F.2d 988, 995 (D.C. Cir. 1975). The District Court's attempt to resort to an admittedly unclear legislative history in the face of such clear statutory language certainly does more to create than resolve ambiguity.

7. We refer the Court to the Brief of the Petitioners, at pages 18-36, containing an extensive discusion of the legislative history of the Act. Suffice it to say that we believe that the District Court did not accord a full and fair reading to the legislative history, or to the previous legislative background.

were warranted in engaging in their far-reaching attempts to inquire behind the language of Section 8.

A recent Fourth Circuit case, considering a remarkably analogous situation, graphically illustrates the error of the District Court's approach here. In *West Virginia Division of the Izaak Walton League of America, Inc. v. Butz,* 522 F.2d 945 (4th Cir. 1975), the Izaak Walton League challenged the legality of certain contracts for the sale of timber in the Monongahela National Forest on the grounds that the terms of the contracts violated the Organic Act of 1897. 16 U.S.C. §§ 475-482. In resolving the controversy, the Court interpreted the provisions of a particular section of the Organic Act. The Court held that in the face of the plain language of the statute, the contracts were indeed unlawful, and that subsequent changes in federal agency's practice could not alter the clear Congressional command. In so holding, the Court found that the statutory language of Section 476 was "simple and unambiguous":

> "The appellants urge that this change of policy was in the public interest and that the courts should not permit a literal reading of the 1897 Act to frustrate the modern science of silviculture and forest management presently practiced by the Forest Service to meet the nation's current timber demands. Economic exigencies, however, do not grant the courts a license to rewrite a statute no matter how desirable the purpose or result might be. 'If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the statute or from its legislative history.'" 522 F.2d at 955.[8]

8. It is true that the Court in *Izaak Walton* did discuss the legislative history of the Act. In so doing, however, the Court carefully noted that it based its decision *primarily* upon a literal reading of the statute. Moreover, it completely affirmed the District Court opinion which wholly relied on the literal language of the Act and refused to examine the legislative history on the ground that "it would serve no useful purpose." 387 F.Supp. at 433 (N.D. W.Va. 1973).

In arriving at this decision, the Court was not simply engaging in wooden notions of justice. In refusing to follow the urgings of the federal government to look behind the plain meaning of the statute, the Court recognized that what the government sought was not an interpretation, but an amendment of the statute. As such, the situation presented here is very similar. In *Izaak Walton,* the Court was faced with an 1897 statute which required the federal government to take certain steps prior to selling timber. The Court recognized that with the passage of three-quarters of a century, significant changes may well have transpired in forest resource management and development. Yet the Court did not undertake to evaluate the complex technological or social issues presented by the respective positions of the parties. Instead, it properly recognized that the role which it was being asked to play was not that of a Court, but a legislature. The Court concluded:

> "We are not insensitive to the fact that our reading of the Organic Act will have serious and far-reaching consequences, and it may well be that this legislation enacted over seventy-five years ago is an anachronism which no longer serves the public interest. However, the appropriate forum to resolve this complex and controversial issue is not the courts but the Congress. The controlling principle was stated in *United States v. City and County of San Francisco,* 310 U.S. 16, 29-30, 60 St.Ct. 749, 756, 84 L.Ed. 1050 (1940):
>
> 'Article 4, § 3, Cl. 2 of the Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." The power over the public land thus entrusted to Congress is without limitations. "And it is not for the courts to say how that trust shall be administered. That is for the Congress."'" 522 F.2d at 955.

The similarities between *Izaak Walton* and the present situation are manifest. In each case, the District Court was called upon to consider a statute dating from the turn of the century. Likewise, in both instances the language of the statute was plain and unambiguous, and the respective federal agency involved was attempting to obtain a "judicial amendment" of the statute. In *Izaak Walton,* however, the District Court took the proper course and refused to engage in a balancing of the competing interests. Instead it applied the statute as it had been written. In the present case, the District Court chose the opposite course and attempted to reinterpret the statute, apparently in order to achieve what it deemed to be the proper result in a controversy between the State of California and the federal government over water resource management.

Without regard to the merits of the positions of the state and federal governments vis-a-vis the water use, it is clear that Section 8 of the 1902 Act requires the federal government to comply with state laws in appropriating water for its reclamation projects. To hold otherwise is to disregard the plain meaning of the statute. If Congress desires to modify the Federal-State relationship which it previously established, then it, not the courts, must act.

C. THE DISTRICT COURT'S INTERPRETATION OF THE LEGISLATIVE HISTORY FAILS TO PROPERLY CONSIDER THE TOTAL FRAMEWORK OF FEDERAL-STATE WATER RELATIONS.

If it nevertheless be deemed necessary to go behind Section 8 of the Reclamation Act in interpreting the Congressional purpose, the legislative history is, of course, one

place to look.[9] In addition, one must look to other relevant legislative enactments. There is one further evaluation to be made in interpreting the meaning of this section of the Reclamation Act which deserves additional mention, especially since it was ignored in the proceedings below.

The Reclamation Act is a specific statute which deals with but one aspect of a far broader area of concern. As such, the Act and its legislative history must be read in the context of that broader concern, not in isolation. When one views the Act as but one part of an evolving effort to develop, maintain and properly utilize the Western States' water resources, it becomes apparent that the limitations

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9. *Amici* realize that the Court must, of course, look to applicable prior case law in resolving this controversy. Such a review provides little assistance in the present case, however, as none of the decided cases faced the issue presented here. As the District Court correctly found, this is essentially a case of first impression. At most, the decided cases stand for the proposition that where the requirements of a specific provision conflict with the general power given to the states by Section 8, the specific provision will prevail. In *Ivanhoe Irrigation District v. McCracken* (1958) 357 U.S. 275, the Court held that the provisions of Section 5 of the Act, which provide that no project water should be sold for use on properties exceeding 160 acres, could not be defeated by the State of California because it would be contrary to state law. Likewise, *City of Fresno v. California* (1963) 372 U.S. 627 considers the relationship between Sections 7 and 8 of the Act. The Court held that the exercise of eminent domain power under Section 7 cannot be defeated by recourse to the more general provisions of Section 8. Finally, in *Arizona v. California* (1963) 373 U.S. 546, the Court was faced with the task of reconciling several sections of the Boulder Canyon Project Act. As it had in its previous Reclamation Act decisions, the Court concluded that the general provisions of the statute in question must not be read so as to negate more specific provisions. While there is discussion of Section 8 of the Reclamation Act in dictum in the opinion, the Court was not called upon to rule on the application of Section 8. The California Supreme Court has recently so interpreted these cases, although we believe the Court misapplied this Court's holdings to the facts of the case. *Environmental Defense Fund v. East Bay Municipal Utility District* (1977) 20 Cal.3d 327.

which the District Court purports to find in Section 8 were not intended by Congress, since an examination of federal and state water law reveals:

1. A lack of any method on the part of the federal government, and a disinclination by Congress to establish such a method, for apportioning intra-state water rights or managing water resources;

2. The concomitant existence of a well-developed state system for determining rights to unappropriated water, and a comprehensive plan for water resource apportionment and management.

1. There Is No Comprehensive Federal Plan for Water Resource Management or Appropriation of Water Rights.

If the lower courts were correct, the Reclamation Act does not require the federal government to comply with state law in the operation of its reclamation projects. This might be a palatable conclusion had the Reclamation Act (or any other federal law) established a method for determining water rights or charged the federal government with maintaining a comprehensive system of water resource usage and management. But such is simply not the case. As the National Water Commission, a federal commission established by Congress to study and report on water programs and policies in relation to the environment,[10] noted in discussing the Reclamation Act and similar federal water programs:

> "These programs came into being one at a time as the American people reached a consensus that a problem existed and that it would be proper for the Federal Government to play a part in solving that problem. But throughout the almost two centuries in which this was taking place the Nation was growing, new demands were evolving, and the people's concept of the role of the Federal Government was changing. It is not surprising, therefore, that some of the basic policies underlying these programs are inconsistent, and, in many respects, anachronistic when viewed in the light of what has happened since they were established." *Water Policies For the Future,* Final Report to the President and to the Congress of the United States by the National Water Commission, June 1973, p. 111 ("National Water Commission Report").

10. See, P.L. 90-915 (1968).

The Reclamation Act is precisely that—a program conceived for a specific purpose at a specific time. Nothing in the lower courts' discussion of the legislative history even remotely suggests that the Act attempted to establish any comprehensive plan for allocating and managing water resources at that time or in the future. Nor do the decisions below point to any other comprehensive federal policy or program for the development of water resources or the apportionment of those resources. This is for the obvious reason that the Congress did *not* intend for the federal government to pre-empt this field.

If Congress had intended the federal government to appropriate water or operate its projects *outside* the scope of state laws, it surely would have established an alternative system in 1902 or at some point thereafter. Yet the absence of comprehensive water policy program on the part of the federal government has persisted to the present. As the National Water Commission noted in its 1973 Report:

> "This Commission concluded early in its life that it had no more important task than that of reappraising existing policies and programs in the light of changed conditions and needs, and of distilling from the results of these appraisals guidelines for bringing the water policies and programs of the United States into con-

sonance with the needs of the Nation in the remaining decades of the 20th Century."

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". . . [T]he Nation has not kept its water policies and programs up to date. It indicates that the kinds of programs the Water Resources Planning Act was intended to bring into being cannot be attained unless the legislation underlying the component programs is brought into consonance with a single set of rational principles and modified to meet changed conditions and demands." *Id.*, at 112-113.

Given the absence of any comprehensive federal program, the conclusion reached by the lower courts that Congress did not intend state law to apply to reclamation projects is at best questionable. Such a conclusion would mean that Congress intended that there be no systematic approach to water problems at any level of government. It would mean that Congress intended to provide no mechanism for resolution of conflicts between state and federal programs, or between one federal program and another. In short, it would mean that water policy would inevitably be made on an *ad hoc* basis.

We submit that such a conclusion is contrary to reason. Water is a precious and limited national resource, "one of several resources without which a Nation cannot satisfy the fundamental wants of its people or achieve the important national goals it sets for itself." National Water Commission Report, at *ix*. Congress was surely aware when it passed the Reclamation Act that some method must exist for regulating water usage and balancing the competing demands for water. The fact that Congress plainly did not attempt to remove power from the states, vest such authority in the Bureau of Reclamation, or any other federal agency, strongly suggests that Section 8 was in-

tended to be given its literal meaning—and federal reclamation projects were to be operated by the Bureau in accordance with applicable state laws. An examination of California's water law system, for example, leaves little doubt that Congress intended that comprehensive determination of water rights and management of water resources remain the province of state laws.

2. California Law Provides a Comprehensive System for Appropriation and Management of Water Resources.

In sharp contrast to the complete absence of a system of water appropriation and management in the Reclamation Act, or elsewhere in federal law, is the existence of such a system in the State of California.[11]

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11. The concern of the State for its water resources finds expression in Article XV, Section 2 of the California Constitution:

"It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

Long before the enactment of the Reclamation Act in 1902, California had recognized a system for establishing water rights.[12] This system of appropriative rights began as an informal custom, and subsequently became formally recognized as the law of the state.[13] It was this system of appropriation which existed in 1902 when the Reclamation Act was passed. Again, there was no federal method of appropriation established, and Section 8 thus expressly provides that state law "relating to . . . appropriation . . . of water was intended to govern federal activities.

Subsequent to that time, and continuing through the present, these fundamental concepts of water regulation have been constantly refined. The California Water Commission Act of 1913 created the State Water Commission, and further defined procedures for obtaining water rights. Ch. 586, 1913 Cal. Stat. 1012. Without attempting to consider exhaustively the sophisticated system of water resource allocation and control developed by the State of California, it is fair to say that the nature of the interests considered by the State in determining water rights has greatly expanded over the years. What originated as primarily economic concerns have broadened with an increasing recognition of the importance of environmental factors, including preservation of fish, wildlife, and natural beauty. All of these concerns have been voiced and accommodated in California's scheme of water resource management.

12. This system of appropriative rights is common throughout the arid states of the western United States, where the Reclamation Act has its focus. *See*, F. Trelease, *Water Law* (1967).

13. The California Supreme Court first recognized the principle of appropriative rights in *Irwin v. Phillips*, 5 Cal. 140 (1855). Legislation passed in 1872 established formal procedures for obtaining appropriative rights.

This process of evolution led to the creation of the State Water Resources Control Board in 1967. Ch. 284, 1967 Cal. Stat. 1441, § 1. With the creation of the Water Resources Control Board ("Board"), responsibility for water rights and water quality, previously the respective functions of the State Water Rights Board and State Water Quality Control Board, was vested in one agency.

Applications to the Board are thus the current method for establishing appropriative rights to water in California. All applications to appropriate water in California must be filed with the Board. Cal. Water Code § 1225. In processing these applications, the Board is not only responsible for determining whether unappropriated water is available, but also for evaluating whether the proposed use is beneficial and in the public interest. Cal. Water Code §§ 1200-01, 1240, 1253, 1255.[14] The stated purpose of the Legislature in establishing the Board was to provide a single mechanism to effectively control and regulate the state's water resources. Cal. Water Code § 174. Broad discretion is vested in the Board to balance competing interests in arriving at water allocation decisions, and the Board is vested with authority to condition the issuance of permits on appropriate terms and conditions, as well as to retain jurisdiction to modify permits it has previously granted. California Water Code § 1394.

Decision 1422, which provoked the initiation of this litigation, represents an attempt by the Board to implement these comprehensive planning considerations. In arriving at its decision, the Board viewed the Bureau appropriation

14. For a more comprehensive discussion of the role of the Board and the development of water management in California, *see* Robie, *Some Reflections on Environmental Considerations in Water Rights Administration*, 2 Ecology L.Q. 695 (1972).

requests for the New Melones Project not in isolation, but in the larger context of the overall water resource needs of the State of California. In addition to the substantial harm to the Stanislaus River which the proposed water use would cause, the Board also found the Bureau had not shown any plan for the use of water, and had not demonstrated a present need for the water from the Stanislaus in light of the fact that the Bureau has ample water elsewhere.[15]

The Bureau, whose own applications for permits led to Decision 1422, thus found itself confronted with a Board decision it did not like. Faced with this problem, the Bureau determined that while it had lived with state procedures for many years, current state laws and policies on water appropriation were not to its liking, and therefore repudiated the State Board's decision, precipitating this litigation. In so doing, the Bureau has chosen the wrong remedy for its disagreement. Instead of taking its case to the Congress to repeal Section 8 in whole or in part, the Bureau has elected to seek a judicial readjustment of the long-standing State-Federal relationship in this area.

The District Court did not find that the rationale of the Board was incorrect or ill advised. Nor did it find that the federal government had a better reasoned program for usage of the water. Instead it found that the Bureau of Reclamation did not have to comply with state law in appropriating water for its projects. Even apart from the plain language of the statute and its legislative history,

15. "Furthermore, the record shows that C.V.P. has substantial quantities of water that are not being used and are not under contract. The Bureau's own records indicate that without the yield of the New Melones Reservoir the Bureau can meet the estimated buildup of demands under present contracts for a long period of years." California State Water Resources Control Board Decision 1422 at 14.

it is simply illogical to assume that Congress intended such a result. There is no contention in this case that the federal government has set up any system for appropriating water or evaluating requests for appropriation. Yet California has consistently over three-quarters of a century developed and continuously refined a comprehensive system for precisely that purpose. Coupling this with the fact that the Bureau has traditionally applied to the state for appropriation permits, the lower courts' rejection of consistently exercised authority is simply incorrect.

III.
CONCLUSION

For all of the reasons advanced herein, the *amici curiae* respectfully submit that the decision of the Court of Appeals should be reversed.

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